90-652

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

DANIEL J. O'CONNOR

v. ***Petitioner,***

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Is the federal extortion Statute, 18 U.S.C. 1951, known as the Hobbs Act, implicated when the FBI set up a business, sought out the petitioner, a police officer, and offered him money which he agreed to accept?
2. Is the federal extortion Statute, 18 U.S.C. 1951, implicated when a public employee accepts tendered payments without inducement or coercion?

PARTIES TO THE PROCEEDINGS

Petitioner Daniel J. O'Connor was appellant before the Seventh Circuit Court of Appeals. Respondent before this Court, the United States of America, was appellee below and commenced the prosecution against Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

PRAYER

Petitioner Daniel J. O'Connor respectfully prays that a writ of certiorari issue to review the judgment and order of the Seventh Circuit Court of Appeals entered in this case on August 21, 1990.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals is published in the official reporters at 910 F.2d 1466 (7th Cir. 1990); the court's opinion affirming the conviction is attached hereto in the Appendix.

JURISDICTION

On August 21, 1990, the United States Court of Appeals for the Seventh Circuit affirmed Petitioner's conviction. No petition for rehearing was filed.

PERTINENT STATUTORY PROVISIONS

Title 18 U.S.C., Section 1951:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do... shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Petitioner Daniel J. O'Connor was charged in a three-count indictment with the violations of RICO statute, Title 18 U.S.C., Section 1962(c); Hobbs Act, Title 18 U.S.C., Section 1951 and the false statement statute, Title 18 U.S.C., Section 1001. After waiving a jury, he was tried before the Court, and at the conclusion of the trial he was found guilty of Count 1 (RICO) and Count 2 (Hobbs Act) and acquitted of Count 3. After a presentence investigation and hearing in aggravation and mitigation, the Court sentenced the petitioner to two and one-half years in the custody of the Attorney General (the last six months on a work release program), a $5000 fine on Count 1, and 3 years proba-

tion on Count 2 with 200 hours of community service, said sentences to run consecutively. A $50 assessment on each count was imposed.

The Federal Bureau of Investigation (FBI) undertook an undercover operation in which they rented a warehouse on the southeast side of Chicago in which agents posed as quasi-legitimate businessmen who also dealt in stolen automobile parts. (Tr. 38)* The undercover operation, called Chirings, (Tr. 35), opened a shop called Willoden in the summer of 1984 in Crestwood, Illinois. Federal agents let the subjects of the investigation know that they were involved in getting damaged goods or over-ordered goods in the Midwest and posing as a legitimate business which also dealt in the consumption of stolen automobiles and automobile parts. (Tr. 37) In August of 1986 they moved Willoden to 10039 S. Torrence Avenue in Chicago, Illinois. (Tr. 37) FBI Agent Lueckenhoff assumed the name of William or Bill Burns specializing in the receipt of stolen automobiles and automobile parts. Hidden video cameras were installed and automobile parts were strewn about the area. (Tr. 43) On August 30, 1986, Agent Lueckenhoff asked to meet petitioner Daniel J. O'Connor through a man named David Gorzellany, a confidential informant of the FBI. (Tr. 44) During that first meeting, O'Connor told Burns that he was a Chicago police officer which Burns already knew and in fact was the reason he wanted to meet the petitioner. (Tr. 48) At that time there was a discussion where Burns told O'Connor that he wanted help in his legitimate business on Torrence Avenue and his illegitimate business that was run out of the same address. It was discussed whether O'Connor could provide inside advance notice as to whether there was going to be any law enforcement investigation of the Torrence Avenue address, whether there were any surveillances and if he could get word to him so he could take appropriate measures so as not to be caught in his illegal activities. "Burns" would pay a monthly stipend to O'Connor. The offer to O'Connor was that he would provide security for both the legitimate and illegitimate portions of the business and advice on how to run the illegitimate portion of the business. (Tr. 52) O'Connor was told that Lueckenhoff

had a three-year lease but if they were going to take too much heat from the police, then he wasn't going to spend the money on the place, and he wanted advice from O'Connor on how to go about the business. (Tr. 54)

They met again on September 5, 1986 at the undercover location at Torrence Avenue. O'Connor arrived in uniform in a police car, and the conversation was taped. In that conversation, Lueckenhoff told O'Connor that he would put him on the payroll just as he had Gorzellany (the informant) on the payroll. (Tr. 63) During the conversation of that date, in discussing remuneration, O'Connor said, "What wouldn't hurt you?" and Lueckenhoff said, "Well, three bills ($300) won't hurt me" and O'Connor stated, "Maybe we should start at five." ($500) O'Connor was then paid $300. (Tr. 68)

There was another meeting on September 13, 1986 at the undercover location. (Tr. 70) That meeting was taped. Lueckenhoff then asked O'Connor if he could get a license plate for him and O'Connor agreed. O'Connor was told that the plate might come up hot (stolen) four or five days later. (Tr. 73-74) The defendant was told that someone was going to grab it, meaning the vehicle to which the license plate was attached was going to be stolen. Lueckenhoff asked how much money O'Connor would want for providing that service; O'Connor did not respond. (Tr. 74) There was a meeting on September 19, 1986 which was tape recorded.

There was a subsequent meeting at the Red Mill Marina on September 29th which was video taped. O'Connor arrived at the meeting in a Chicago Police squad car (Tr. 92) and the agent gave O'Connor $200. (Tr. 93) O'Connor told Lueckenhoff that he understood that Gorzellany was a pigeon (informant) and that that information came from the highest source and that Gorzellany was cooperating with the federal government. (Tr. 94, 95)

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* References to the transcript of trial proceedings will be "Tr._____."

On November 15, O'Connor arrived at the Torrence Avenue undercover operation in a Chicago Police Department paddy wagon. There was a conversation during which time O'Connor was given $150, and Lueckenhoff explained that he was still behind in the amount of payments he was supposed to have made and he would get him the rest of the money as soon as possible. (Tr. 99) Again, at that meeting O'Connor repeated that Gorzellany was a snitch (informant).

Burns (Lueckenhoff) met with O'Connor on November 17 where he made another request for registration information on a certain license plate. The next day O'Connor gave him a slip of paper which contained the name and address of the person to whom the car was registered and the date it was run through the computer, November 17, 1986.

On December 15, O'Connor paged Lueckenhoff who returned the page, and O'Connor mentioned that they hadn't seen each other and wanted to know where he had been and they said they would arrange a meeting in a few days. (Tr. 105) Lueckenhoff did not meet him; he did not page him. He saw O'Connor by happenstance on February 21, 1987 on the street. They had a conversation. O'Connor was in uniform and wanted to know where he, Burns, had been. Lueckenhoff (Burns) said he had been in the hospital and hadn't been to the business, said he was better and would be back in business and would get in touch with O'Connor. Lueckenhoff contemplated the relationship between him, as Bill Burns the undercover agent, and O'Connor would run for about a three-year period which was the lease arrangement he had signed at Able Armature to keep the Torrence Avenue address in operation. (Tr. 107) The building in question was heated by natural gas from Northern Illinois Gas Company (supplying the interstate nexus). The car parts stored on the premises which were portrayed in Government's Exhibits Photo 1, 2, 3, and 4 came from prior investigations and some of the parts came from FBI personnel in Tennessee and Missouri.

The agent then summarized the payments as follows: September 5 - $300; September 29 - $200; October 25 - $200; November 15 - $150; November 18 - $100. Total - $950.

On cross-examination, Lueckenhoff admitted the purpose of the alleged chance meeting in September was to meet Daniel O'Connor, a Chicago police officer. (Tr. 114) Lueckenhoff brought up the fact that he was willing to pay money (Tr. 114), and he finally quoted the figure of $300. He had more than $300 available to him on that night, but only paid $300. When he discussed talking to O'Connor, he referred to the money as a salary. (Tr. 119) From September 5 to November 18, the agent paid O'Connor a total of $950 in five separate payments. The government chose the amount of money that would be paid each time. (Tr. 121) There was a decision by the government to make monthly payments to the officer. (Tr. 123) The government could have made the decision to make payments every two months if they thought it would be good for their investigation. In the September 25th telephone conversation, the agent admits he said to O'Connor, "I have to get together with you because I need to get you two bills." ($200). O'Connor never asked for any money by using words "give me money today." It was always the agent's decision when to give money to O'Connor and how much to give him. (Tr. 125) O'Connor never called the agent and complained that he was late with the money or hadn't been given any money that month or never asked the agent when he was going to give him money. On October 25 when $200 was given to O'Connor at the Red Mill Marina, O'Connor didn't ask for the money. (Tr. 126) The Agent admitted on cross-examination that he did not pay him any extra for getting him the license plate information. (Tr. 132-133) The last payment was November 18, and in a phone call in December, O'Connor didn't ask for any money. (Tr. 138) O'Connor didn't drop by the warehouse looking for money nor did the agent get any messages that he had been by to see him. Burns saw O'Connor on February 21 at a chance meeting on the road. O'Connor didn't ask for any money. (Tr. 139)

REASONS FOR GRANTING THE WRIT

Rule 10. Considerations Governing Rule on Writ of Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter... U.S. S.Ct. Rule 10.1(a)

The Seventh Circuit does not require any inducement or coercion on the part of a public employee who has accepted moneys tendered to influence his duties to sustain a conviction for extortion under color of official right pursuant to 18 U.S.C. 1951. However, in the Second Circuit, Ninth Circuit and Sixth Circuit, inducement is an essential element of a Hobbs Act offense.

The Third, Fourth and Eleventh Circuits follow the rule in the Seventh Circuit. *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir. 1982), *United States* v. *Spitler*, 800 F.2d 1267 (4th Cir. 1986), *United States* v. *Swift*, 732 F.2d 878 (11th Cir. 1984).

There is a definitive conflict in circuits which should be resolved by this Court.

The Seventh Circuit opinion in the instant case practically invites this Court to resolve this conflict (see Appendix).

Justice Easterbrook, writing for the majority in the instant case, sets forth the dichotomy and then he says, "No matter which is the "best" reading of the Hobbs Act, our circuit's approach is too firmly established and too frequently reaffirmed to be revisited. The task of producing agreement among the circuits is for Congress or *the Supreme Court.*" (emphasis added)

"Chirings" operation was set up not in an effort to learn if a police officer or mobster would drop by and demand monthly payments. See *United States* v. *Brooklier*, 685 F.2d 1208 (9th Cir. 1982). This was an operation in which the federal agents specifically sought out a policeman and offered him money to protect their alleged illegal operation. This cannot in any way be considered extortion under color of official right.

There was no fear petitioner would arrest them because he never knew of their existence until they approached him. In fact, petitioner caused no harm to their business even after they stopped paying. In fact, in another Seventh Circuit case, *United States* v. *Davis*, 890 F.2d 1373 (7th Cir. 1989), it was held that an official violates the color of official right prong of Section 1951 when he or she encourages or accepts payments prompted by the hope that the official will be influenced in the exercise of his or her powers.

The petitioner didn't encourage or accept payments premised on the hope that he would be influenced. The government foisted the money upon him by arranging to meet him, telling him what they wanted and asking him how much he wanted to protect their operation. He extorted no one within the meaning that Congress intended in passing the Hobbs Act. This is a case of pure and simple state bribery by O'Connor receiving payments to which he wasn't entitled.

It is time, we submit, that this Court resolve the serious conflict in circuits and adopt the holding of the Second Circuit in *United States* v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984), *en banc*, holding that an official must solicit the bribes and the mere receipt by a public official of things of value without solicitation is insufficient. Acceptance of benefits by a public official without inducement is not extortion. *United States* v. *Campo*, 744 F.2d 944 (2d Cir. 1985).

O'Grady and *Campo* have been recently followed by *United States* v. *Garcia*, 907 F.2d 380, (2d Cir. 1990) decided June 29, 1990. There a congressman and his wife were convicted under 18 U.S.C. 1951 for receipt of a $20,000 loan. While the government

conceded in *Garcia* that there was no implicit threat to obtain the loan they contended that the lender feared that Garcia would not look favorably upon him in the future if the loan was not made.

In reversing the conviction, the Second Circuit emphasized that the payments were not made out of fear or that Garcia threatened any harm. Citing *United States* v. *Capo*, 817 F.2d 947 (2d Cir. 1987), the Court held that a Hobbs Act prosecution must show evidence of possible detrimental action for non-payment.

As no feeling of fear was created by Garcia, no conviction could stand.

The Ninth Circuit has interpreted "color of official right to require a demand by the public official." If the money was paid voluntarily, it was not obtained by the officer "by color of his office." Demand on the part of the payee, and "unwillingness" on the part of the payor were correlative. *United States* v. *Aguon*, 813 F.2d 1413 at 1413 (9th Cir. 1987).

In *Aguon*, the Court held that the words "to extort" meant "to obtain from an unwilling person."*

Not so in this case. Undercover FBI Agent Lueckenhoff was not only not unwilling, he can be heard salivating in offering to pay O'Connor. Extortion? No circuit but the Seventh has gone this far in stretching to uphold a Hobbs Act conviction. If the money was paid in New York or Los Angeles, rather than Chicago, no federal law would be implicated.

Just as this Court put down the spurious federal prosecutions of local bribes by striking down the intangible rights theory of mail fraud in *McNally v. United States*, 483 U.S. 359 (1987),

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* In *United States* v. *Jenkins*, 902 F.2d 459,467 (6th Cir. 1990), inducement was held to be an essential element of a Hobbs Act prosecution.

we submit that this Court should rule the sting operations which were set up specifically to approach, solicit and then give money to public officials cannot create a Hobbs Act prosecution on the theory that payment was made because of the fear of the official status of the defendant. Congress intended the Hobbs Act to apply where a public official refused to do his duty unless he was paid or acted in an official way because he was paid. It did not envision the federal government seeking out public officials and offering them money and then crying "EXTORTION!!!"

The FBI agents set up a sting operation by posing as receivers of stolen property and sought out policemen in order to see if they would accept bribes to protect the undercover operation. An FBI informant introduced the petitioner to an undercover agent and a deal was struck—for $500 a month the officer would give advance warning of possible police action and in other ways protect the operation. The officer, the petitioner here, Daniel J. O'Connor, did not seek out the agents, never demanded any money, and during the course of the several months that payments were made, never asked for money, never harassed the agents when they were either late or lacking in full payment or made no payment at all.

In the two and a half months that money was paid, O'Connor only got the $500 a month agreed upon on one occasion, got less than one-half in another month, half the third month and nothing thereafter. He made no protest or demand nor did he bring police action upon the "fencing" business to induce or coerce payments. In fact when the agents later identified themselves as federal officers, the petitioner returned the money which he had never spent but had retained at home.

Extortion under color of official right encompasses those instances where a public official either refuses to act in his official capacity without a fee or renumeration to which he is not entitled or acts against someone either to induce payment or in retaliation for future to pay and then relents when payment is made.

In this case, there is none of this. The agents did not pay out of fear of the defendant's office; they paid because of his office in order to establish "extortion."

Agent Lueckenhoff never testified that he had any fear of the petitioner or his badge which induced the payoffs but instead was candid to admit that the amounts of money paid and the timing of those payments were all controlled by the FBI.

The Second, Ninth and Sixth Circuits hold that there must be more than a passive, uninduced receipt of money by a public employee to constitute extortion under the Hobbs Act. The Seventh, Fourth, Eleventh and Third Circuits hold otherwise.

The rules of this Court provide that a special or important reason for the granting of a writ of certiorari would be conflict of decision amongst the circuits. S.Ct. Rule 10.1(a). Public officials in different states acting identically are either prosecuted or not, are either sent to prison or not, are stripped of their office or not, based on the happenstance of geography, not the law of the land.

A policeman in Chicago, however wrong he may be in taking money, should not be subject to federal prosecution as an extortionist while his counterpart in New York State or California will not be so treated for doing the same act. Either they all violated federal law or none of them did.*

We pray this Court grant this Writ to resolve this conflict and give true meaning to the phrase emblazoned on your courthouse—"Equal Justice Under Law."

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* This Court has already, in this term, granted a writ of certiorari to review a decision of the Fourth Circuit Court of Appeals involving a Hobbs Act prosecution and the issue of voluntary, uncoerced payments. *McCormick* v. *United States*, No. 89-1918, *cert granted*, 10/3/90, decision below *United States* v. *McCormick*, 896 F.2d 61 (4th Cir. 1990). O'Connor might be considered a companion case on similar issues.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the United States
Court of Appeals
For the Seventh Circuit

No. 90-1103
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL J. O'CONNOR,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 152—**James B. Moran**, *Chief Judge.*

ARGUED AUGUST 8, 1990—DECIDED AUGUST 21, 1990

Before POSNER and EASTERBROOK, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* Daniel J. O'Connor, a crooked policeman, got caught in a sting operation. Federal agents posing as shady auto parts dealers—not above buying stolen cars to satisfy their customers' wants or cannibalize for parts—approached O'Connor and asked for notice of any potential investigations that might affect their business. At the initial meeting O'Connor described the tips he had provided to David Gorzellaney, operator of a bowling emporium cum gambling house, who introduced O'Connor to the agents. Gorzellaney was by then cooperating with the FBI. O'Connor boasted to "Bill Burns" (the lead agent's *nom de guerre*) that he had not only tipped Gorzellaney off to raids but also once took part in a raid and hid from fellow police officers evidence that Gorzellaney had overlooked.

Burns told O'Connor that he needed similar aid and also wanted security for legitimate used-parts sales. O'Connor generously offered to use his patrol car to help Burns transport stolen merchandise and to wear a beeper so that Burns could reach him as needed. O'Connor did not come cheap. He asked Burns: "What wouldn't hurt you?", to which the agent replied "Well, three bills [$300 per month] won't hurt me." O'Connor replied: "Maybe we should start at five." Burns agreed, provided the monthly payments were in installments. O'Connor got $300 on the spot. During the next two months he received another $650 in four installments. In exchange O'Connor agreed to give Burns news pronto, to "put a little feeler out" to potential buyers of stolen merchandise, and to obtain information about the addresses of the owners of cars whose license plate numbers Burns would furnish. Burn's "customers" would "shop" for cars by cruising the streets to find models they liked, then furnishing license plate numbers; Burns needed to track down the cars and arrange for their "appropriation". During the two months in which payments continued, O'Connor learned and told Burns that Gorzellaney had become a "pigeon" for the FBI and should be avoided. O'Connor also furnished computer printouts showing registration information for cars to be stolen.

Burns stopped paying O'Connor after two months, pleading ill health and poor business. O'Connor tried to get in touch with Burns, paging him and even once following him in a patrol car. Burns promised to resume payments. He never did; instead a grand jury indicted O'Connor, charging him with engaging in a pattern of racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, and extortion, in violation of the Hobbs Act, 18 U.S.C. §1951. Convicted after a bench trial, O'Connor has been sentenced to 2½ years' imprisonment, to be followed by 3 years' probation.

O'Connor contends that the evidence is insufficient to establish a "pattern" of racketeering, a necessary ingredient of the RICO offense. He emphasizes that "Burns" and the other agents determined the number and timing of payments that

would be made, and he maintains that there must be a "pattern" from his side as well as from the agents'. True enough, but the trier of fact was entitled to conclude that O'Connor was prepared to (and did) undertake an extended series of criminal acts (taking bribes, providing information and protection) that would continue indefinitely, so long as Burns needed his services. Fences do not pay all the money up front; reciprocity—a "pattern" of money for information in increments—is important to maintain trust and loyalty.

Although the inference of a pattern was by no means open and shut (given the leading role played by the FBI), the evidence permitted a reasonable trier of fact to conclude beyond a reasonable doubt that O'Connor had committed himself to an enduring series of criminal acts, sufficient to establish a "pattern" under *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), and *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987). O'Connor points to other cases in which this court has concluded that the evidence did not make out a pattern. There are many such cases—perhaps there is even a pattern of using the "pattern" requirement to trim off the excesses in civil RICO suits. *H.J.* emphasizes the impossibility of fitting all RICO cases to a single pattern, and nothing of moment could be achieved by surveying and attempting (probably vainly) to reconcile the many cases. Once a case has been tried, the evidence and reasonable inferences must be taken in the light favorable to the verdict. That perspective, when added to our holding in *Horak*, requires affirmance.

As for extortion: O'Connor points out that the agents did not testify that O'Connor put them in fear that if they did not pay, he would act against them in an official capacity. Under *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (in banc.), *United States v. Aguon*, 813 F.2d 1413 (9th Cir. 1987), modified in banc, 851 F.2d 1158 (1988), and *United States v. Jenkins*, 902 F.2d 459, 467 (6th Cir. 1990), inducement is an essential ingredient of the Hobbs Act offense. As the final opinion in *Aguon* observes, however, a system of payment in exchange for official acts can

itself demonstrate inducement: there is an *implied* threat of unpleasant consequences for nonpayment, whenever payment is a way of life. At all events this court, in common with several other circuits, e.g., *United States v. Spitler*, 800 F.2d 1267, 1274-75 (4th Cir. 1986); *United States v. Swift*, 732 F.2d 878, 880 (11th Cir. 1984); *United States v. Jannotti*, 673 F.2d 578, 595 (3d Cir. 1982) (in banc), has rejected the strong inducement requirement of *O'Grady*, and has held that a public employee in a postion to dole out or withold official favors who solicits or accepts bribes under color of official right commits the crime of extortion. E.g., *United States v. Davis*, 890 F.2d 1373, 1378 (7th Cir. 1989); *United States v. Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987); *United States v. Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985); *United States v. Price*, 617 F.2d 455, 458 (7th Cir. 1979); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974) (Clark, J.); *United States v. Crowley*, 504 F.2d 992, 995 n.5 (7th Cir. 1974); *United States v. Staszcuk*, 502 F.2d 875, 878 & n.5 (7th Cir. 1974), adopted in banc, 517 F.2d 53, 60 (1975) (Stevens, J.). If we were to overrule all of these (and many similar) cases, as O'Connor asks us to do, a conflict among the circuits would remain. No matter which is the "best" reading of the Hobbs Act, our circuit's approach is too firmly established and too frequently reaffirmed to be revisited. The task of producing agreement among the circuits is for Congress or the Supreme Court.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

(2)

No. 90-652

Supreme Court, U.S.
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OCTOBER TERM, 1990

DANIEL J. O'CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to prove that petitioner, a Chicago police officer, induced payoffs "under color of official right" within the meaning of the Hobbs Act, 18 U.S.C. 1951.

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Hobbs Act, 18 U.S.C. 1951 *et seq.*:	
18 U.S.C. 1951	2, 4-5
~~18 U.S.C. 1951(b)(2)~~	
18 U.S.C. 1001	2
18 U.S.C. 1962	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-652

DANIEL J. O'CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 13-16, is reported at 910 F.2d 1466.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1990. The petition for a writ of certiorari was filed on October 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962; and one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to two and a half years' imprisonment on the racketeering conviction and three years' probation on the Hobbs Act conviction. The court of appeals affirmed. Pet. App. 13-16.

1. The evidence at trial showed that petitioner, a Chicago police officer, took several bribes in exchange for information about police activities. The payers of the bribes turned out to be FBI agents conducting an undercover "sting" operation, and this prosecution followed. Pet. App. 13-14; Gov't C.A. Br. 5-12.

In 1986, Special Agent William Lueckenhoff and other undercover FBI agents opened a business in a Chicago warehouse. Agent Lueckenhoff posed as "Bill Burns," a criminal in the business of purchasing stolen vehicles and vehicle parts. Based on information that petitioner had been taking money in return for protection from police activities, Lueckenhoff had a confidential informant arrange a meeting with petitioner. Pet. 3; Pet. App. 13; Gov't C.A. Br. 5.

At the initial meeting, Agent Lueckenhoff asked petitioner whether he could notify him of any police investigations that might affect his stolen parts business. Petitioner responded in the affirmative and described similar tips he had given the confidential informant, who operated a bowling alley that housed an illegal gambling business. As one example, petitioner boasted that he not only provided warning of an upcoming police raid but slipped an overlooked pair of dice into a glass of soda he was drinking so that his fellow officers would not find them. Petitioner reminisced about the "good old days" when he worked on the

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[1] He was acquitted of making a false statement in violation of 18 U.S.C. 1001.

vice squad and repeatedly took illegal payoffs. Pet. App. 13; Gov't C.A. Br. 6.

Upon hearing of petitioner's exploits, Agent Lueckenhoff requested similar assistance for his business. Petitioner agreed to provide it. He assured Lueckenhoff that he would warn him if the police became suspicious of his business and that he could intercede with most of his fellow officers if Lueckenhoff found himself in trouble. Petitioner offered to use his patrol car to transport stolen merchandise safely and agreed to wear a beeper so that Lueckenhoff could easily contact him. Petitioner asked Lueckenhoff how much he would pay for those services. When Lueckenhoff suggested $300 per month, petitioner responded that they "should start at five" hundred dollars per month. Lueckenhoff agreed, provided that he could make the monthly payments in installments. He gave petitioner $300 at once. Over the next two months, Lueckenhoff paid petitioner an additional $650 in four installments. Pet. App. 14; Gov't C.A. Br. 7-8.

During those two months, petitioner provided a steady flow of information to Lueckenhoff. He provided the addresses of individuals who owned cars that Lueckenhoff supposedly wanted to steal. He learned that the confidential informant was a "snitch" and warned Lueckenhoff to avoid the informant. And he described to Lueckenhoff ongoing government investigations of various businesses and assured him that if the police began investigating Lueckenhoff's illegal enterprise, he would "[p]ut the kabosh on it" so that Lueckenhoff would not face criminal charges. Pet. App. 14; Gov't C.A. Br. 8-12.

After two months, Agent Lueckenhoff stopped paying petitioner. Over the next three months, petitioner paged Lueckenhoff repeatedly. Finally, as Lueckenhoff was leaving his business one night, petitioner followed him in a patrol car. Petitioner signaled Lueckenhoff to pull over to

the curb. After Lueckenhoff stopped, petitioner questioned him about where he had been. Lueckenhoff explained that he had not called on petitioner because he had been in the hospital. Lueckenhoff assured petitioner that now that he was well, business would pick up and he would again call on petitioner. Pet. App. 14; Gov't C.A. Br. 11-12.

2. Petitioner moved for a judgment of acquittal at the close of the evidence. On the extortion count, he argued that his conduct did not violate the Hobbs Act because "he never ask[ed] for anything, never demand[ed] anything." Tr. 184. The government replied that it was not necessary for the public official to perform any specific act in exchange for the payment; as long as the payment "is induced by the public official and resulted from the performance of his own duties, that's enough for extortion." Tr. 195.

The district court denied the motion and found petitioner guilty on the extortion and racketeering counts. Explaining its finding of guilt on the extortion count, the court stated that petitioner, "for periodic payments, was going to do a number of different things. One was to keep his eyes open and his ears open at the department to see if there was any heat on the Torrence Avenue operation." Tr. 250. The court explained that petitioner's conduct violated the Hobbs Act because

> [t]he crux of the statut[ory] requirement of "under color of official right" is the public official's use of his office. Here, Lueckenhoff, he set it up that way [an exchange of money for use of official position], that was certainly his intention to convey that message, and that was the message that was conveyed in the other direction.

Ibid.

3. On appeal, petitioner argued that extortion "under color of official right" within the meaning of the Hobbs

Act, 18 U.S.C. 1951, requires proof that the bribe was "induced," and he contended that the evidence in this case failed to establish inducement.[2] In response, the government presented alternative grounds for affirmance. First, the government argued that "[i]n this Circuit, '[e]xtortion "under color of official right" equals the knowing receipt of bribes; they need not be solicited.' " Gov't C.A. Br. 23 (quoting *United States* v. *Holzer*, 816 F.2d 304, 311 (7th Cir. 1987), vacated and remanded on other grounds, 484 U.S. 807 (1988)). Second, and consistent with its position before the district court, the government suggested that petitioner in fact induced the payoffs. "[C]ontrary to his claim, [petitioner] was not simply a passive recipient of Agent Lueckenhoff's bribes", Gov't C.A. Br. 25:

> [Petitioner] did not simply await Agent Lueckenhoff's calls but initiated contact with Agent Lueckenhoff on numerous occasions. [Petitioner's] attempts to reach Agent Lueckenhoff became more and more frequent when Agent Lueckenhoff failed to respond. Tr. 104-07. Not eager to end their lucrative arrangement, [petitioner] paged Agent Lueckenhoff repeatedly and even followed Agent Lueckenhoff by car and pulled him over to extract a promise of future contact. Tr. 106-07. [Petitioner's] active pursuit of Agent Lueckenhoff and his reluctance to let go of a relationship built on payoffs reveal that he was more than simply a passive recipient of bribes.

Ibid.

The court of appeals affirmed petitioner's convictions. Pet. App. 13-16. After citing cases from other circuits

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[2] Petitioner also argued that the evidence failed to establish a pattern of racketeering activity to support his RICO conviction. Pet. App. 14-15. Petitioner does not renew that claim here.

holding that "inducement is an essential ingredient of the Hobbs Act offense," the court explained that "a system of payment in exchange for official acts can itself demonstrate inducement: there is an *implied* threat of unpleasant consequences for nonpayment, whenever payment is a way of life." Pet. App. 15-16. In any event, the court concluded, Seventh Circuit precedent did not require proof of an inducement for improper payments. Pet. App. 16.

ARGUMENT

1. The circuits are divided on the question whether extortion "under color of official right" within the meaning of the Hobbs Act, 18 U.S.C. 1951, requires proof that the defendant "induced" the offer of property that he received. The Second and Ninth Circuits hold that proof of inducement is required, see *United States* v. *Aguon*, 851 F.2d 1158, 1162-1167 (9th Cir. 1988) (en banc); *United States* v. *O'Grady*, 742 F.2d 682, 687 (2d Cir. 1984) (en banc), while most of the other circuits hold that it is not, see Pet. 7; Pet. App. 16.[3]

Whatever the correct construction of the statute, petitioner's conviction should stand because, as the district court held and the court of appeals implied, his conduct constituted inducement even under the minority interpretation of the Hobbs Act.

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[3] Although the opinion of the Sixth Circuit in *United States* v. *Jenkins*, 902 F.2d 467 (1990), can be read to adopt the inducement requirement of *O'Grady* and *Aguon*, see 902 F.2d at 467, that statement was dictum and conflicts with the court's initial observation that "a plausible argument can be made, although neither party makes it, that inducement is not an element of extortion under the Hobbs Act when the extortion is charged as obtaining property 'under color of official right,'" *id.* at 463.

The circuits that require proof of inducement recognize that such proof includes inducement implied by a series of transactions between the public official and the one paying for the official acts. Thus, while the Second Circuit in *O'Grady* held that "mere acceptance of benefits by a public official" cannot constitute extortion under color of official right, it added that the official need only do "something, under color of his public office, to cause the giving of benefits." 742 F.2d at 687. Accordingly, it is not necessary that the official expressly solicit a bribe or take some affirmative steps to instill fear in the person who pays it; the Hobbs Act is violated if the "public official *makes wrongful use of his office to obtain money* not due him or his office." *Ibid.*

Wrongful use of a public office includes inducement that can be communicated subtly through a series of exchanges. As the principal opinion in *O'Grady* acknowledged, "inducement can take many forms." 742 F.2d at 691. The concurring opinion of Judge Pierce in *O'Grady*, which was joined by a majority of the court, put the point more explicitly: "the jury should be permitted to infer inducement by the defendant based upon a finding of repeated acceptances over a period of time of substantial benefits (*i.e.*, benefits of a nature and magnitude which reasonably could affect a public official's exercise of his or her duties)." *Id.* at 694; see also *United States* v. *Tillem*, 906 F.2d 814, 821 (2d Cir. 1990); *United States* v. *Campo*, 774 F.2d 566, 568-569 (2d Cir. 1985) (per curiam).

Likewise, the Ninth Circuit in *Aguon* explained that an " 'inducement' can be in the overt form of a 'demand,' or in a more subtle form such as 'custom' or 'expectation' such as might have been communicated by the nature of defendant's prior conduct of his office." 851 F.2d at 1166.

Petitioner's conduct clearly constituted "inducement" as defined by those circuits that require such proof. See *United*

States v. *O'Grady*, 742 F.2d at 694; *United States* v. *Campo*, 774 F.2d at 568-569. The facts as found by the district court show that petitioner received a series of payments in exchange for information and protection. Continuation of those services was the implied inducement for petitioner's monthly retainer.

Petitioner offers a different explanation for his conduct, asserting that "[t]he government foisted the money upon him," Pet. 8, and that this case involves the "passive, uninduced receipt of money by a public employee," Pet. 11. The evidence, however, belies that interpretation, and the district court, sitting as the finder of fact, rejected petitioner's characterization. As the district court noted, petitioner agreed to perform a number of services in exchange for the periodic payments. Tr. 250. What is more, when Agent Lueckenhoff offered to pay him $300 per month, petitioner insisted that the amount be $500 per month. When the flow of payoffs stopped, petitioner repeatedly paged Lueckenhoff and even pulled him over one night on the street, inferably in an effort to induce Lueckenhoff to resume the payments. Thus, because petitioner engaged in conduct that would violate the Hobbs Act in any circuit, this case is not an appropriate one in which to address the question of the proper construction of the federal offense of extortion under color of official right.

2. Petitioner suggests that his Hobbs Act conviction may be affected by the decision in the pending case of *McCormick* v. *United States*, No. 89-1918 (argued Jan. 8, 1991). Pet. 11 n.*. *McCormick* involves the question whether the payments to the defendant in that case were legitimate campaign contributions, which fall outside the ambit of the Hobbs Act, or were instead prohibited payoffs. The payments to petitioner in this case clearly cannot be construed as legal under any version of the facts. Accordingly, and

because petitioner's conviction would be affirmed by every circuit that has addressed the issue, there is no need to hold the petition pending the Court's decision in *McCormick*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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